IN THE

United States Court of Claims

No. 481-61

WALTER E. BANTOM, ET AL.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

PETITION FOR REHEARING

(Filed MAR 30 1964

The plaintiffs file this petition for rehearing within 30 days from the date of the decision on March 13, 1964 primarily upon the ground that the Opinion of the Commissioner, which has now been approved by the Court, conflicts with the Opinion of this Court in the cases of Mack N. Albright v. U. S., No. 263-61 and R. B. Baker, et al. v. U. S., No. 323-61. The Commissioner's Opinion attempts to distinguish the facts in the Albright and Baker cases from the facts in the Bantom case. The plaintiffs in all three of these cases were Security Policemen performing identically the same duties. The plaintiffs in the Albright and Baker cases were employed by the Department of the Navy at the Norfolk Naval Ship-

yard, while the plaintiffs in the Bantom case are employed as Security Policemen by the Department of the Army at Frankford Arsenal located near Philadelphia, Pennsylvania.

An examination of the facts and the Opinions of the Court in these two cases (Albright and Baker being consolidated), the conclusion must be reached that this Court on the same statement of facts has determined that Security Policemen employed by the Navy are entitled to recover while those Security Policemen employed by the Department of the Army are not entitled to recover. Of course, this Court has the right to overrule its Opinion in the Albright and Baker cases, but the Opinion in the Bantom case does not do this. It is thought that by innuendo, at least, that Commissioner Herbert N. Maletz hoped to have the Court adopt an Opinion that would overrule the Albright and Baker cases although, he weakly attempts to differentiate between the Albright and Baker and the Bantom case stating no specific reasons why there is any difference between the work performed by the Security Policemen embraced in the Albright and Baker cases and the same work as performed by the Security Policemen in the Bantom case. Some of the facts allegedly found by the Commissioner are based on fiction rather than evidence at the hearing.

RESUME OF THE FINDINGS OF FACT IN THE ALBRIGHT & BAKER CASES.

These plaintiffs were employed as Civilian Guards at the Norfolk Naval Shipyard, Portsmouth, Virginia. They sought to recover overtime compensation for the respective periods of their employment falling within the six years preceding the filing of the petition.

The basis of their claims was that they were required to report for duty at least 20 minutes prior to the com-

mencement of an 8 hour duty in order to perform certain routine duties in connection with being mustered and assigned to their duty posts. The defendants sought to offset such period of extra duty for the time taken for meals. The sole question involved in these cases was whether the government could claim credit for the luncheon period. The regulations of the Navy Department provide that guards may visit canteens on the post for necessary meals, and there were canteens at various stations in the shipyard. Most of the guards brought their food from home in the form of sandwiches, etc., and ate on the job at their assigned posts, that is, while walking a beat, sitting at a stationary post or riding in a vehicle on a patrol assignment. The actual consumption of this type of meal would take about 20 minutes. The guards were also permitted to purchase food "to go" at the canteens on their posts if it did not interfere with performance of their duties, and on infrequent occasions guards requested permission to eat at the cafeteria, and such requests were granted if there was someone available to cover their posts during their absence. (Finding No. 6)

RESUME OF THE FACTS IN THE WALTER E. BANTOM, JR., ET AL. CASE.

The plaintiffs were Security Policemen or Guards at the Frankford Arsenal under the Department of the Army located near Philadelphia, Pennsylvania. They claim that they were required to report 30 minutes prior to the start of their tour of duty. There were three shifts known as the A, B, and C shifts. The A shift was from 7:30 a.m. to 4:00 p.m.; the B shift was from 3:30 p.m. to 12 Midnight; and the C shift was from 11:30 p.m. to 8:00 a.m. This, you will note, was for a period of 8½ hours during which time they were entirely in a duty status.

While there was no written order requiring them to report ½ hour prior to the time they went on duty, the practice and custom growing over a period of years was that they reported from 15 to 30 minutes prior to their muster and roll call. They had to be in uniform, properly shaved, shoes shined and had to have the issuance of their side arms.

The government contended that the 30 additional minutes was for a lunch period during each of the A, B and C shifts. Like the Civilian Guards employed at the Norfolk Naval Shipyard, 90% of the plaintiffs in the Bantom case carried their own lunch. It was eaten while they were in a duty status, and they were permitted to obtain food from the cafeteria or a snack bar which was open during the A and B shifts, but there were no facilities from which you could obtain food during the C shift, or on Saturday or Sunday.

The question involved in the case was whether the government was entitled to charge ½ hour for eating in lunch periods when the lunches were eaten while they were in a duty status and in the same manner as the lunches were eaten by the plaintiffs in the Albright and Baker cases. There is no difference whatever between the lunch periods in these two cases. In May 1962 for the first time the plaintiffs were given free time during the ½ hour lunch period and this is the first time that they were ever taken off a duty status during the ½ hour period.

The resume of the Albright and Baker cases and the resume of the Bantom case shows that there is no substantial difference, as far as the lunch period was concerned. In the Opinion of the Commissioner it was stated that the luncheon meal could be eaten at Police Headquarters or other areas within the Arsenal as individuals saw fit. There were only two of the plaintiffs who were at the Police Headquarters. There was no evidence at all

that the regulation giving them a 30 minute lunch period prior to May 1962 was ever carried out. The Commissioner also found that the Policemen were free to have their lunch anywhere in the Arsenal. In this connection, attention is invited to the regulation setting forth the lunch period on page 11 of the Findings of Fact of the Commissioner which provides in part as follows:

> "The Security Policemen on their lunch period will not be permitted to leave the installation where they are posted and must be in such a place where they may be reached by telephone and the nearest telephone number will be given to the Police Captain prior to taking the lunch period. When messing facilities are not available, Security Policemen are required to bring their lunch."

It is therefore clear that as found by the Commissioner, they could not eat in any cafeteria, the only one available, unless it was near their post, and the fact is that 90% of the men brought their own lunch. The Commissioner also seems to have found that a plaintiff taking his lunch period would go off-duty. The government's own witness testified (Tr. 510) that all of the plaintiffs were on duty in each shift during the time covered by these shifts, that is, for the 8½ hour period.

The plaintiffs insist that the lunch period they had prior to May 1962, when for the first time they were free during the ½ hour period, was identically the same period was accorded to the Civilian Guards doing the same type of work as they in the Albright and Baker cases.

This Court said, in its Opinion in the Albright and Baker case:

> "But defendant says that since the regulations permitted the guards to visit the canteens for meals, eating time is to be deducted even though the guards

were walking post while they were eating. This is manifestly unsound. A noncompensable lunch period is an off-duty period, which these plaintiffs did not have, and could not have as the schedules existed, unless relieved, due to the nature of their employment as security guards and the requirement of management for maintaining constant surveillance."

Particular attention is directed to the above quote defining a noncompensable lunch period as an off-duty period. The only time that these plaintiffs had an off-duty period for lunch was from May 1962 when the specific order was given. Furthermore, attention is directed to the fact that those employees on the C shift, which was rotated, did not carry their lunch because they had already eaten before they went on duty and they worked the 8½ hours straight through.

Unless this Court intended, by its Opinion on March 13, 1964, to overrule what it said in the Albright and Baker cases, these plaintiffs are entitled to recover perhaps not for the full hour as they sued for but they certainly are entitled to recover for the lunch period. They worked 8½ hours and they are entitled to be compensated for it. Plaintiffs may not be able to recover for all they sued, but in the interest of right and justice they are entitled to recover compensation for the time they were employed over and above the 8 hour period on each shift for the reason you cannot reconcile the decision in the Albright and Baker cases with the decision in this case. The lunch periods are identically the same.

CONCLUSION

For the reasons herein stated, this petition for rehearing should be granted and the case put down for further oral argument before this Court.

Respectfully submitted,

CLAUDE L. DAWSON
810-18th St., N. W., S. 307
Washington 6, D. C.
Attorney for the Plaintiffs.

Court's action on Plaintiff's *petition for rehearing*

On May 15, 1964, the court entered an order denying plaintiff's petition for rehearing.

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THE UNITED STATES

I, Frank T. Peartree, Clerk, United States Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above cause, of the Commissioner's opinion, findings & conclusion, of the Opinion of the Court, Per Curiam, of the findings of fact and Conclusion of Law, of Plaintiff's petition for rehearing and of the court's action on the petition for rehearing.

(SEAL)

IN TESTIMONY WHEREOF I HAVE hereunto set my hand and affixed the seal of the United States Court of Claims at Washington City this 22nd day of July, A. D., 1964.

(signed) Frank T. Peartree
Clerk, United States Court of Claims.